CASES AND MATERIALS
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PART II

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CHAPTER VII

CAUSATION: A MATTER OF FACT OR A MATTER OF LAW?

The statement that the defendant in a case did not "cause" the plaintiff's injury and therefore ought not to be required to compensate him for it seems simple and straight-forward enough. Through the magic of the common law, however, it has been rendered both complex and deceptive.

It is a story with which you will be familiar. The same language is used to express two quite distinct ideas. To say that the defendant in a case did not "cause" the plaintiff's injury may mean that what the defendant did was of no significance in bringing about the damage. That is a meaning you would have anticipated. But it may mean that, notwithstanding the defendant's conduct was a factor in bringing about the injury, defendant ought not to be held legally responsible because the conduct does not seem blameworthy or, there was other conduct contributing to the injury which seems more blameworthy. That is a meaning which you might not have anticipated.

Why would the same language be used to express these two ideas? The problem is that the concepts, though distinct, are related. Conduct causes harm. Negligence describes conduct of a certain type. Since only conduct of this type results in liability there is a tendency to skip a stage in the reasoning. Instead of asking whether the plaintiff's harm was caused by the defendant's conduct and then proceeding to ask whether the conduct could be considered negligent, the tendency is to ask whether the plaintiff's harm was caused by the defendant's negligence. Once one thinks in terms of <u>negligence</u> "causing" harm it is easy to equate the absence of negligence with the absence of cause. And this is what courts and counsel (not necessarily in that order) have done countless times and will probably continue to do as long as negligence remains the principal theory of liability. In a word, then, the same language is used to express two ideas because frequently there has been a failure to realize that they <u>were</u> two ideas.

In some of the more scholarly judgments and some of the scholarly writing the two concepts are distinguished by the labels "cause in fact" and "legal cause". But while this indicates that the particular judges and the particular scholars have not been confused, it does not really suggest workable terminology for general use because the labels are sufficiently congruent to contain the seeds of continuing confusion.

The cases in this chapter illustrate the two concepts in a variety of forms, as well as the confusion.

CHAPTER VIII: PROOF OF NEGLIGENCE: RES IPSA LOQUITUR

Note on the Trial Process

A civil action is a formal procedure for settling a dispute between or among the parties. Unable to resolve their disagreement by negotiation, one of them has invoked the assistance of the Court. Generally, the assistance of the Court is sought by the party who wishes to bring about a change in the status quo. In a tort action this usually means that someone has suffered a loss and wishes the Court to change the status quo by shifting that loss to someone else through the medium of a damage award, although sometimes he may be seeking an order against the continuation of the status quo by requiring damaging conduct to be stopped.

The dispute among the parties may involve one or more of three elements. It may be as to the facts: the events that transpired involving the parties. It may be as to the law: the rule that governs the type of situation disclosed by the facts. Or it may be as to the application of the law: the way in which the governing rule should be brought to bear on the particular facts. Most cases that go to trial are primarily disputes of fact. The trial is primarily a fact-finding process. The parties seek by evidence to establish what events have transpired, and frequently, when the fact determinations have been made, the law and its application fall fairly readily into place. It is probably fair to say that only in a minority of trial cases is there a serious dispute as to the law or its application. In appellate courts the situation is reversed. Appeal courts are reluctant to interfere with trial courts on questions of fact, especially where the credibility of witnesses is involved, since there is thought to be some advantage in seeing and hearing the witnesses as they testify. On the other hand, appeal courts are more authoritative on legal questions. Consequently the only appeals really worth taking, and most appeals actually taken, involve questions of law.

This chapter is concerned with the proof of facts at a trial; facts which in the plaintiff's case disclose a cause of action, facts which in the defendant's case negate a cause of action or disclose a defence. But where one is proving facts, even though there is no dispute of law, the law plays an important role because it determines what facts are significant. In a battery case, for example, the legal definition of battery dictates that plaintiff will try to prove, and defendant will try to deny, that the latter intentionally struck the former a physical blow. Or, alternatively, the definition of self-defence will dictate that the defendant try to prove he was being attacked by the plaintiff at the moment when he intentionally struck the plaintiff and that he did it in order to protect himself. It is this nexus between law and fact that leads lawyers to talk, frequently, about "proving that there was a battery". It is a shorthand way of saying "proving facts that will bring the plaintiff's claim within the definition of a battery". Unless one understands this, the use of the shorthand can be misleading.

Lawyers often talk, too, about "proving negligence" as though negligence were a fact like any other. But this is similarly misleading: To be sure, in proving particulars of negligence, such as high speed and lack of attention in a motor vehicle case, or the failure to do a sponge count or use sponges with strings attached in a surgical malpractice case, one is proving facts. But the ultimate conclusions that these particulars constitute negligence involves a value judgment. The conduct proved to have taken place is measured against a community standard or norm - as represented by the behaviour of the "reasonable man" in like circumstances - and is adjudged to be negligent if it

falls below the standard. One should properly talk, therefore, of "proving facts which will lead to a finding of negligence". One's perception of the legal meaning of negligence will shape one's decision as to the important facts or particulars.

More particularly this chapter is concerned with "the proof of negligence".

METROPOLITAN RAILWAY COMPANY v. JACKSON

House of Lords.(1877) 3 App. Cas. 193

THE LORD CHANCELLOR (Lord *Cairns*):—

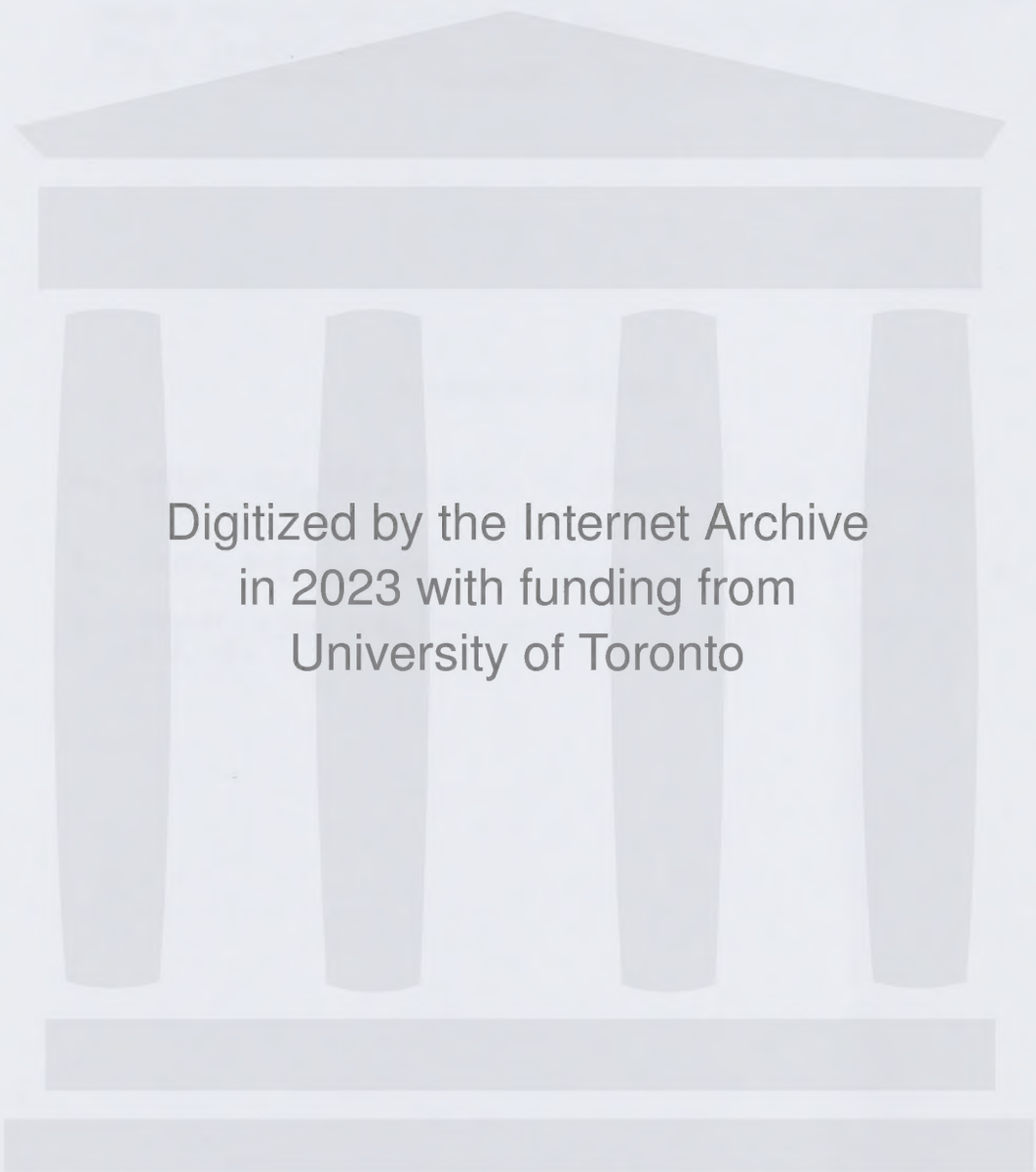
My Lords, in this case an action was brought by the Respondent against the *Metropolitan Railway Company* for negligence in not carrying the Respondent safely as a passenger on the railway, and for injuring his thumb by the act of one of the Appellants' servants in suddenly and violently closing the door of the railway carriage.

The question is, Was there at the trial any evidence of this negligence which ought to have been left to the jury? The Court of Common Pleas, consisting of Lord *Coleridge*, Mr. Justice *Brett*, and Mr. Justice *Grove*, were of opinion that there was such evidence. The Court of Appeal was equally divided; the Lord Chief Justice and Lord Justice of Appeal *Amphlett* holding that there was evidence, the Lord Chief Baron and Lord Justice of Appeal *Bramwell* holding that there was not.

The facts of the case are very short. The Respondent in the evening of the 18th of July, 1872, took a third-class ticket from *Moorgate Street* to *Westbourne Park*, and got into a third-class compartment; the compartment was gradually filled up, and when it left *King's Cross* all the seats were occupied. At *Gower Street Station* three persons got in and were obliged to stand up. There was no evidence to shew that the attention of the company's servants was drawn to the fact of an extra number being in the compartment; but there was evidence that the Respondent remonstrated at their getting in with the persons so getting in, and a witness who travelled in the same compartment stated that he did not see a guard or porter at *Gower Street*.

At *Portland Road*, the next station, the three extra passengers still remained standing up in the compartment. The door of the compartment was opened and then shut; but there was no evidence to shew by whom either act was done. Just as the train was starting from *Portland Road* there was a rush, and the door of the compartment was opened a second time by persons trying to get in. The Respondent, who had up to this time kept his seat, partly rose and held up his hand to prevent any more passengers coming in. After the train had moved, a porter pushed away the people who were trying to get in, and slammed the door to, just as the train was entering the tunnel. At that very moment the Respondent, by the motion of the train, fell forward and put his hand upon one of the hinges of the carriage door to save himself, and at that moment, by the door being slammed to, the Respondent's thumb was caught and injured.

The case as to negligence having been left to the jury, the jury found a verdict for the Respondent with £50 damages. There was not, at your Lordships' bar, any serious controversy as to the principles applicable to a case of this description. The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been



CHAPTER IX: DAMAGES FOR PERSONAL INJURY AND DEATH: SURVIVAL OF ACTIONS

Personal injuries generate a variety of losses of a pecuniary or financial nature. Some writers call them economic losses, although this use of the term is initially puzzling to an economist. Hospital and medical expenses and loss of income are the most common. Where these losses are ascertained at the time of the trial or settlement of a personal injury action or claim they are compensated for under the heading of special damages. Sometimes, however, these damages cannot be fully determined at the time of the trial or settlement because, due to the lasting or permanent nature of the injury, they lie in some measure in the future. Because of the once-for-all damage award that is the common law norm, an effort must nevertheless be made to determine what they may be so that the judgment at trial or the settlement can finally conclude the issue. Prospective losses are sometimes referred to as general damages but this term is also used to apply to damages awarded in respect of harm which is not pecuniary or financial: pain and suffering, and the sense of loss that goes with a crippling or life shortening injury. The various heads of general damages have something in common; they cannot be readily ascertained. They are also markedly different, however. Future pecuniary loss cannot be ascertained because it has not yet occurred. Damages for non-pecuniary "losses" cannot be ascertained because they are not financial in nature, although some writers suggest that a market value could be attached to them. Consider, as you read through the cases and materials, the advantages and shortcomings of the common law approach to compensation for personal injury.

Sometimes, of course, personal injuries are fatal and those who survive the deceased suffer loss. Compare the attitude of the law towards the losses suffered by the survivors with its attitude towards injury compensation.

Fatal injuries are not always instantly fatal. Sometimes the victim survives for a shorter or longer period before succumbing. Then it can be said that the victim and those who survive him suffer loss. Should the claim of the victim, if it has not been dealt with before death, survive for the benefit of the estate? Should the claims against the victim also survive the death and be capable of being pursued against the estate? And finally, should both the victim and the victim's survivors have a right to compensation?

These are some of the obvious questions arising in this chapter. No doubt there are many others that will come to you.

(a) Damages for Personal Injuries

PHILLIPS v. SOUTH WESTERN RAILWAY COMPANY

Queen's Bench Division. (1879) 4 Q.B.D.406

COCKBURN, C.J. .....

It is extremely difficult to lay down any precise rule as to the measure of damages in cases of personal injury like the present. No doubt, as a general rule, where injury is caused to one person by the wrongful or negligent act of another, the compensation should be commensurate to the injury sustained. But there are personal injuries for which no amount of pecuniary damages would afford adequate compensation, while, on the other hand, the attempt to award full compensation in damages might be attended with ruinous consequences to defendants who cannot always, even by the utmost care, protect themselves against carelessness of persons in their employ. Generally speaking, we agree with the rule as laid down by Brett, J., in *Rowley* v. *London and North Western Ry. Co.* (1), an action brought on the 9 & 10 Vict. c. 93,